



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: February 6, 2012

CBCA 2317

HILLCREST AIRCRAFT COMPANY,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Leslie H. Wiesenfelder of Dow Lohnes PLLC, Washington, DC, counsel for Appellant.

Heather M. Self, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **GOODMAN**, and **DRUMMOND**.

**BORWICK**, Board Judge.

Background

In this appeal, appellant, Hillcrest Aircraft Company, seeks payment from respondent, the Department of Agriculture, of appellant's invoices totaling \$118,702.05 for federal excise taxes (FET) it paid during performance of its commercial item contract with respondent for helicopter fire fighting services. In a contracting officer's decision, respondent refused to pay the invoices, maintaining that under the unique commercial item tax clause at 48 CFR 52.212-4(k), all federal, state, and local taxes were included in the basic contract rates and that additional payments were not warranted under the contract. In its timely appeal from that decision, appellant presents a number of

arguments why the FET invoices are reimbursable.<sup>1</sup> For the reasons set forth below, we find appellant's arguments unpersuasive. Consequently, we sustain the decision of the contracting officer and deny the appeal.

### Findings of Fact

#### Pertinent contract terms and conditions

This appeal involves a contract for helicopter services for the Department of Agriculture, National Interagency Fire Center, Boise, Idaho. The solicitation and resulting contract incorporated clauses of the Federal Acquisition Regulation (FAR), 48 CFR 52.212-1, 52.212-3, 52.212-4, and 52.212-5. The procurement was designated a commercial item procurement, and subject to the special clauses for commercial items.

FAR 52.212-4(k) (the Commercial Item Tax clause) provides in one short sentence:

#### **Taxes.**

The contract price includes all applicable Federal, State, and local taxes and duties.

This clause contrasts with the more complex Standard Tax clause at FAR 52.229-3(b) (the standard tax clause), which was not included in the contract. This clause provides in pertinent part:

(a) As used in this clause-

“After-imposed Federal tax,” means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period,

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<sup>1</sup> The parties submitted their dispute on the record, pursuant to Board Rules 18 and 19 (48 CFR 6101.18, .19 (2011)). The record consists of the appeal file (submitted in PDF format on CD-ROM), the parties' record submission and reply record submission memoranda, exhibits attached to those memoranda, and supplemental memoranda. The record submission exhibits include, but are not limited to, affidavits and supplemental affidavits of Mr. Gale Wilson, appellant's president, and the declaration of the contracting officer, Mr. Frank Gomez.

on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date. It does not include social security tax or other employment taxes.

....

All applicable Federal, State, and local taxes and duties means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

(b) The contract price includes all applicable Federal, State, and local taxes and duties.

(c) The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise.

The objective of the solicitation was to procure one to thirty-three standard category, fully operated heavy and medium helicopters, meeting the requirements of the solicitation for operation at various host bases around the country, and during certain specified periods. Offerors could submit offers on some or all of the thirty-three host bases listed as contract line items.

The solicitation required prospective contractors to bid a fixed price with economic price adjustments for the helicopters' daily availability for fourteen hours per day at the host base and a rate for flights. The solicitation stated that since there was no guarantee of flight hours given by the Government, this portion of the solicitation and resulting contract was to be of the indefinite quantity type.

The flight rates that could be offered were listed in exhibit 12 to the solicitation. Hourly flight rates were stated for each make and model of helicopter listed in the exhibit. Also listed were fuel consumption in gallons, and load calculation and weight reduction in pounds for listed make and model of helicopter. Respondent states that these rates were developed after consultation with the Helicopter Association International (HAI) Government Committee (the HAI committee). Respondent states that it made clear during its consultation with the HAI committee that the rates in exhibit 12 to the solicitation included payment of FET.

The solicitation and resulting contract specified that the helicopters were to be available for the exclusive use of the Government during a mandatory availability period (MAP) of the contract. The helicopters were to be used for incident support, administrative flights, and law enforcement, provided that the prospective contractor agreed in writing to perform law enforcement. The solicitation and resulting contract also provided that respondent could place orders for the helicopters' optional use outside the mandatory availability period, subject to acceptance by the contractor. The contractor could agree to provide such service using one of the two payment methods described in the solicitation: (1) the daily availability rate and specified flight rate method; or (2) payments at an optional use hourly price submitted in the offeror's proposal.

The solicitation and resulting contract also provided for payment rates of other possible expenses during performance of the contract. For example, overnight hotel and other travel expenses of contractor personnel while away from the home base were to be paid at the rates established by the Federal Travel Regulation. Transportation costs of personnel from the home base were to be paid based on actual costs incurred by the individual for airplane tickets and car rentals, itemized with receipts.

Of importance to this appeal is the Miscellaneous Cost clause, which we set forth below:

#### C-44 MISCELLANEOUS COSTS TO THE CONTRACTOR

- (a) Housing, subsistence, ground transportation, and other expenses will be the responsibility of the Contractor or its employees at the Host Base.
- (b) The Government will reimburse the Contractor for any airport use costs the Contractor is required to pay when ordered to operate from an airport other than the host base such as airport landing fees, tie-down charges, or other similar type costs.
- (c) Miscellaneous unforeseeable costs not recovered through the contract payment rates and are the direct result of ordered service may be reimbursed at actual cost if approved by the Contracting Officer. Examples of this are truck permits at ports-of-entry when the fuel servicing vehicle must cross state lines in fulfillment of ordered services or State use taxes

imposed on equipment brought into the state. [Emphasis added.]

(d) Itemized receipts must support claims for reimbursement and must be kept on file by the contractor and made available to the CO [contracting officer] upon request.

Under clause E-4 of the solicitation, awards were to be made to those offerors whose proposals were technically acceptable and whose technical/price relationships were the most advantageous to the Government. Respondent reserved the right to award any combination of items or number of items.

#### The procurement process

On October 9, 2009, respondent held a pre-proposal conference, attended by appellant's officials. One prospective offeror asked a question about subsection C-44, i.e., whether state use taxes would be reimbursed as other expenses for travel to the host base. Respondent's answer was no, because "all costs should be figured into your proposal." Through amendment one to the solicitation, the closing date for proposal submission was made October 30, 2009, and the questions and answers at the pre-proposal conference were incorporated into the amended solicitation. Prospective contractors were to submit both technical and price proposals.

On or about October 21, 2009, appellant submitted offers on a number of items. As allowed by the solicitation, however, appellant stated that it was only willing to accept a maximum award of two items. Appellant offered prices on items 28 (Wenatchee, Washington) and 32 (Sled Springs, Oregon). For item 28, appellant proposed to use the Bell Helicopter 205 A++. For the base option year, appellant offered a daily availability rate of \$4892 for a MAP of 120 days. For option years 1, 2, and 3, appellant offered a daily availability rate of \$5064, \$5242, and \$5504, respectively. For the estimated 400 hours of flight time for the Bell Helicopter Model 205 A++, appellant offered \$626,000, which is the product of the estimated 400 hours and the hourly flight rate of \$1565, which is specified in Exhibit 12 to the solicitation for that make and model of helicopter. For item 32 (Sled Springs), appellant again offered the Bell Helicopter Model 205 A++ and a daily availability rate of \$4900 for the base option year, and \$5072, \$5250, and \$5513 for option years 1 through 3, respectively. For the estimated 350 flight hours for this item, appellant offered \$547,750, which is the specified daily flight rate for the Bell Helicopter Model 205 A++ times the estimated hours. Appellant also proposed optional hourly use rates for potential optional use outside the MAP that might be ordered by respondent.

According to Mr. Wilson, the only rates “bid by Hillcrest” were the daily availability rate for the MAP and the optional use rate. This is true only in a narrow, literal sense, since appellant was required to, and did, offer the solicitation’s specified pre-defined flight rates for the estimated flight hours.

Respondent posed questions about appellant’s technical proposal, which appellant answered on November 13, 2009.

The next activity related to the procurement occurred on or about May 18, 2010, when Mr. Wilson requested a meeting with respondent’s contracting officials to discuss excise taxes in relation to this contract.

Mr. Wilson states that two years before, on or about May 13, 2008, in a procurement for similar helicopter services, Department of the Interior (DOI) contracting officials had informed him that DOI would no longer, as it had in the past, make a determination as to the amount of FET owed and add it to a contract invoice. Rather, DOI stated it was now the responsibility of the contractor to determine the applicability of the tax, calculate the amount of tax due, and add the tax to a contract invoice for payment. Also, Mr. Wilson had assumed that firefighting flight services procured under DOI’s contracts were exempt from payment of FET as exempt fire fighting services. However, the DOI letter informed him that the firefighting services exemption applied only to flights when the aircraft were hauling and dropping fire retardant (colloquially called “dropping water”), and implied that it did not apply to a broader scope of operations necessary to support fire fighting services. In this regard, DOI’s letter states:

Revenue Rule 76-477 exempts aircraft from passenger and cargo taxes under Sections 4261 and 4271 of the IRS [Internal Revenue Service] code when if [sic] an aircraft is used with only the Contractor’s employees aboard, such as flights to spot fire or drop fire retardant chemicals. This exemption would apply to helicopter bucket operations, when the flight is conducted with only the Contractor’s employees aboard.

#### Immediate pre-award meeting

After receipt of the May 13, 2008, letter, Mr. Wilson states that he began to educate himself with respect to the issue of FET as it impacted appellant’s contracts. With respect to the appealed contract, Mr. Wilson states that he requested a meeting on May 18, 2010, to advise respondent’s contracting officials that appellant would have to bill FET to the Government on a flight-by-flight basis if it received an award. The

meeting was scheduled for May 20, 2010. According to Mr. Wilson, upon entering the meeting, the contracting officer handed him the notice of award. Mr. Wilson states:

I had heard that other helicopter companies had been audited [by the IRS], and that was simply by way of information for the Forest Service as well as additional support for the decision I had made and was then communicating to the Forest Service in no uncertain terms that Hillcrest was going to bill the Forest Service on a flight-by-flight basis for the [FET] Hillcrest would incur in performing the two items it has just been awarded.

In this regard, he handed respondent's contracting personnel tax material generated by DOI and the IRS.

#### Appellant's prior procurements with respondent

The appealed contract was not appellant's first experience with a helicopter contract for respondent. The contracting officer for the appealed contract served for fifteen years as respondent's contracting officer administering respondent's helicopter contracts. He is familiar with appellant's previous experience and performance with those contracts. According to the contracting officer, appellant held eight helicopter contracts with respondent from 2002 through 2009 for services similar to those in the appealed contract. Each of those contracts contained an indefinite delivery/indefinite quantity (IDIQ) clause, and the same tax clause as in the appealed contract. To the best of this contracting officer's recollection, appellant did not invoice respondent for excise taxes under those contracts. Appellant states that it had, under one of those contracts, provided helicopter service from Wenatchee, Washington, one of the awarded items in the appealed contract. Appellant also states that it did not pay the Government FET under those contracts.

#### The awarded contract and appealed contract invoices

As noted above, on May 20, 2010, respondent awarded appellant the contract for items 28 and 32, incorporating the terms and conditions of the solicitation, including the clause at FAR 52.212-4(k). Between June 3 and October 6, 2010, appellant submitted seventeen invoices requesting reimbursement from respondent of FET that appellant had paid to the Government. Appellant states, without contradiction from respondent, that appellant invoiced respondent \$42,560.40 for FET on the daily availability rate activities for item 28 and \$44,467.50 for the daily availability rate activities for item 32. Appellant invoiced respondent \$31,674.15 for FET on non-daily availability rate activities. The total of the invoices was \$118,702.05. Appellant did not submit invoices to respondent

for FET on fuel. Respondent refused to pay the invoices, maintaining that all taxes were included in the offered price.

On February 4, 2011, appellant submitted a certified claim to the contracting officer for reimbursement of the FET that appellant had submitted, separately from the contract invoices, to respondent. By decision of February 23, 2011, the contracting officer denied the claim. The contracting officer stated in pertinent part:

As we discussed earlier this year . . . we have been operating on the premise that all applicable costs were to be included in your proposal. . . . The only costs in addition to the firm fixed prices would be costs specifically allowed for under the contract.

. . . .

Under our rotary wing contracts . . . the contracts are structured as [firm fixed-price] and include the . . . FAR tax clause which states that prices offered are inclusive of all taxes. I have determined that Taxes, Federal, State and Local taxes are not permissible to be paid under the contract as an additional cost over and above the Firm Fixed Prices offered.

From that decision, appellant filed an appeal at this Board.

### Discussion

#### Federal excise tax matters

Statute imposes a FET of 7.5% on the amount paid for taxable transportation of any person. 26 U.S.C. § 4261(a) (2006). Statute also imposes a date-dependant sliding-scale domestic segment tax for each segment of taxable transportation by air. 26 U.S.C. § 4261(b)(1). Statute exempts from those taxes helicopter transportation of individuals, equipment, or supplies in the exploration for or development or removal of hard minerals, oil, or gas, or by helicopter or fixed wing aircraft for the purpose of the planting, cultivation, cutting, transportation of, or caring for trees (including logging operations). 26 U.S.C. § 4261(f)(1), (2). Statute also exempts from the domestic segment tax any domestic segment beginning or ending at a rural airport. 26 U.S.C. § 4261(e)(1)(A).

Statute imposes a tax of 6.25% upon the amount paid within or without the United States for the taxable transportation of property and applies only to amounts paid to a person in the business of transporting property by air for hire. 26 U.S.C. § 4271.



The FET on transportation of persons and property does not apply to transportation by aircraft having a maximum certified takeoff weight of 6000 lbs or less. 26 U.S.C. § 4281. IRS Revenue Ruling 72-156, 1972 C.B. 331, provided that a helicopter service “involving the dispersal of fire retardant” is not transporting persons or property by air for hire, and thus not subject to the FET for transportation of persons or property. By that revenue ruling, the IRS also concluded that Congress’s intent in enacting the revenue statutes was to have one set of taxes (either the transportation or fuel taxes) apply in any particular instance. Statute imposes a tax on aviation fuel of \$0.193 per gallon. 26 USC §§ 4041, 4081(a)(2)(A(ii)). Consequently, the IRS advised in that revenue ruling that aerial firefighting services involving the dispersal of fire retardant would be subject to the fuel tax imposed by 26 U.S.C. § 4041, not the transportation tax.

The conclusions of Revenue Ruling 72-156 were published in an IRS tax information letter on September 30, 2002:

[Revenue Ruling] 72-156, 1972 C.B. 331, provides that where an air tanker company contracts with a government agency to provide aerial firefighting protection, specifically the dispersal of fire retardant, neither of the [excise] taxes [for transportation of persons or property] is applicable.

According to IRS Publication 510 (Apr. 2009), taxable transportation is defined as transportation that begins and ends in the United States or at any place in Canada or Mexico not more than 225 miles from the nearest point on the continental United States boundary. The taxes for persons and property are imposed on a trip by trip basis, and a round-trip is considered two separate trips for imposition of the taxes. According to that publication the tax on the transportation of property does not apply to aerial fire-fighting services.

As noted in appellant’s record submission memorandum, the tax application dates for the FET for transportation of property and persons were repeatedly and continually extended by Congress, from September 30, 2007, through June 30, 2011. Appellant’s Record Submission Memorandum at 37-38 (listing of public laws). There were further extensions through July 22, 2011, Pub. L. No. 112-21, § 2(b)(1), (2) (June 29, 2011), and then through September 16, 2011. Pub. L. No. 112-27, § 2 (b)(1), (2). The most recent version extends the tax applicability to January 31, 2012. Pub. L. No. 112-30, § 202(b)(1),(2)(Sept. 16, 2011); 26 U.S.C.A. § 4261(j)(1)(A(ii)). In short, the record shows throughout the procurement process and until recently continual and uninterrupted extensions of applicable tax dates.

### Contentions of the Parties

To understand the contentions of the party it is necessary to compare the Commercial Item Tax clause with the Standard Tax clause. The Commercial Item Tax clause contains the same requirement as the Standard Tax clause that “the contract price includes all applicable Federal, State and local taxes.” The Standard Tax clause contains a definition of “applicable taxes” that is not included in the Commercial Item Tax clause:

All applicable Federal, State, and local taxes and duties means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

The Standard Tax clause also contains an adjustment provision for any after-imposed federal tax, not contained in the Commercial Item Tax clause:

The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise.

An after-imposed Federal tax is defined in the standard tax clause as:

any new or increased Federal excise tax . . . that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

Appellant argues that the amounts of the invoiced FETs were unforeseeable, thus compensable under the Miscellaneous Cost clause of the contract. Beyond having crews staffed and ready to fly from the home base, appellant argues it could not foresee where it would be ordered to fly, how long a distance it would be ordered to fly, or whether it would be ordered to fly from a home base or an alternate base. Appellant’s Record Submission Memorandum at 15-20. Furthermore, appellant argues that at the time of submitting its proposal on October 21, 2009, Congress had not set the FET tax rates for 2010. Those rates were not set until December 16, 2009. Respondent argues that the Commercial Item tax clause of FAR 52.212-4(k) unambiguously states that all contract payments include all federal, state, and local taxes, and that there is no contractual right to further reimbursement for the invoiced FET.

The case law construing the Standard Tax clause, FAR 52.229-3(b), holds that the phrase “the contract price includes all applicable Federal, State and local taxes” unambiguously requires that bidders or offerors include all applicable state and local taxes in their bids or offers. *Hunt Construction Group v. United States*, 281 F.3d 1369,

1372 (Fed. Cir. 2002); *B & M Cillessen Construction Co. v. Department of Health and Human Services*, CBCA 1110, 09-1 BCA ¶ 34,069, at 168,460. In the context of this case, the same phrase in the Commercial Item Tax clause is also applied to the pre-defined flight prices in the contract that prospective contractors were required to offer in the IDIQ portion of the contract, since, *ipso facto*, taxes were already included in the pre-defined prices stated in exhibit 12 to the solicitation.

Appellant argues that the Miscellaneous Cost clause in C-44(c) allows for recovery of the invoiced FET. Appellant is wrong. The Miscellaneous Cost clause is not comparable to the after-imposed tax provision in the Standard Tax clause. This is the case for three reasons: (1) The Miscellaneous Cost clause, although referencing state use taxes as an example of a possible unforeseen cost, makes no mention of after-imposed federal taxes. (2) The clause, by its terms, applies to unforeseen costs “not recovered through the contract payment rates.” The meaning of “unforeseeable” is “unexpected.” *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122 (1943). In this case, the existence of the FET cannot be deemed unexpected or unforeseeable, since the FET is a statutory requirement, which has been extended for many years, including the years of performance of this contract. It is true, as appellant states, that the precise amount of FET that appellant would have to pay on behalf of respondent could not be determined until the flight services were rendered and the FET were levied. However, as an experienced helicopter services contractor, appellant knew before it submitted an offer that the precise amount of tax would vary, depending on the number and distance of flights ordered. Appellant possessed eight years of contract experience with respondent and could have made reasonable estimates as to the likely FET appellant would have to include in its proposal to cover the FET.<sup>2</sup> The terms and conditions of the contract placed a tax variance risk on appellant. (3) The contract required that the FET were to be recovered through the specified contract rates, but the Miscellaneous Cost clause only applies to those costs explicitly not recovered through those rates

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<sup>2</sup> Appellant argues it assumed until May 2008 that fire fighting services were broadly exempt from the FET. If it was not clear in the IRS’s Revenue Ruling 72-156 that any FET exemption for fire-fighting services would apply only to “dropping water,” the narrow scope of the FET exemption was made explicit in the IRS tax information letter of September 30, 2002, and again in DOI’s letter in May of 2008. Appellant was well informed of the narrow scope of the FET exemption before it submitted an offer on the procurement for this contract.

Appellant argues that the definition of “applicable tax” found in the Standard Tax clause should be read *in pari materia* with FAR 52.212-(k).<sup>3</sup> Appellant’s Supplemental Brief at 5. An applicable tax in the Standard Tax clause is defined as a tax in existence as of the date of contract award. Applying that definition, appellant argues that the contract price could not include FET imposed after the date of contract award, i.e., any FET imposed and owing after July 3, 2010. If such were the case, most of the invoiced taxes would be respondent’s additional responsibility under 26 U.S.C. § 4261(d) in addition to the contract rates respondent has already paid appellant.

In its supplemental record submission, appellant properly notes that regulations, like statutes, are to be construed *in pari materia*. *Roberto v. Department of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). Statutes and regulations addressing the same subject matter generally should be read as if they were one law. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006); *Strategic Housing Finance Corp. of Travis County v. United States*, 608 F.3d 1317, 1330 (Fed. Cir. 2010). Appellant argues that it makes no difference that FAR 52.229-3 is much more detailed than FAR 52.214-4, because it views the two sections as a system of related general provisions, citing *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 396 (1934).

The defined term of “applicable tax” in the Standard Tax clause will not be read into the Commercial Item Tax clause. This is so because the commercial item clauses at FAR 52.212-4 were promulgated to impose simplified and unique provisions dealing with government commercial item contracts as distinct from standard non-commercial government contracts. The commercial item provisions implement the Federal Acquisition Streamlining Act of 1994 (FASA), which “streamline[s] the acquisition process and minimize[s] burdensome Government-unique requirements.” 60 Fed. Reg. 48,231 (Sept. 18, 1995). FASA provides that contract clauses for commercial item contracts were be those clauses that were required to implement provisions of law or executive orders applicable to acquisitions of commercial items or determined to be consistent with standard commercial practices. 41 U.S.C. § 3307(e)(2)(B).

Towards that end the drafters of the FAR promulgated FAR 52.212-4, which contained terms and conditions that were:

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<sup>3</sup> By order of October 6, 2011, after a conference call of the same date, the Board asked the parties to brief this question. The parties submitted supplemental memoranda in addition to their record submissions and reply record submissions.

Consistent with customary commercial practice by addressing general areas that previous studies have identified as the “core” areas covered by commercial contracts. Several concepts included in the clause at 52.212-4 represent significant changes from standard Government practices to commercial-like practices.

60 Fed. Reg. 48,232. The commercial item contract clauses are thus intended to be significantly different from the standard government contract clauses. Consequently, *in pari materia* treatment is not warranted and we are not at liberty to apply the definition of “applicable tax” in the Standard Tax clause to construe the Commercial Item Tax clause.

Since the term “applicable” in the Commercial Item Tax clause is not defined, and is not subject to *in pari materia* reading with the definition contained in the Standard Tax clause, we use the term as it is understood in its ordinary sense of “capable of being applied, having relevance, or fit, suitable, or right to be applied.” *Ransom v. FIA Card Services*, \_\_\_\_ U.S.\_\_\_\_\_, 131 S.Ct. 716, 724 (2011) (construing phrase “applicable monthly expense” in bankruptcy statute and citing Webster’s Third New International Dictionary 105 (2002)). Consequently, the applicable tax to be included in the contract prices are those FET that were paid upon provision of the service, not just the FET in existence at the time of contract award. *Cf. City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 346-47 (E.D.N.Y. 2008) (broad construction of phrase “applicable tax” in Contraband Cigarette Trafficking Act to apply to New York state taxes not enforced by state authorities on Indian reservation).<sup>4</sup>

Appellant’s other arguments are not persuasive. Appellant argues that 26 U.S.C. § 4261(d) trumps the Commercial Item Tax clause. Appellant’s Record Submission at 34. The statute requires that the taxes shall be “paid by the person making the payment subject to the tax,” i.e., the purchaser of the transportation services or respondent in this case. 26 U.S.C. § 4261(d). Appellant argues, citing *Koshland v. Helvering*, 298 U.S. 441, 447 (1936), and similar cases, that a regulation may not amend a statute.

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<sup>4</sup> Appellant’s reliance on *BMY, Division of Harsco Corp.*, ASBCA 36805, 93-2 BCA ¶ 25,684, in support of its definition of “applicable tax” is misplaced. In *Harsco*, the board rejected the Government’s argument that extended FET should be considered applicable taxes included in the original bid. It did so because the Standard Tax clause included the after-imposed tax provision, provided the contractor warranted that no amount of any after-imposed federal tax was included in the contract price as a contingency. *Id.* at 127,782. In our case, the after-imposed tax provision and the accompanying warranty are not included in the Commercial Item Tax clause.

The proposition is correct, but simply does not apply here. Appellant's argument presumes that respondent's reading of FAR 52.212-4(k) means that FET will not be fully paid by the responsible party, the Government. Appellant's argument ignores a subsequent section, 26 U.S.C. § 4263(c). If the purchaser of the transportation--respondent in this case--does not pay the FET, the carrier--i.e., appellant--is required to pay them. 26 U.S.C. § 4263(c). See *Temco Helicopters, Inc. v. United States*, 409 F. App'x 64 (9<sup>th</sup> Cir. 2010); 106 A.F.T.R. 2d 2010-6564. Respondent argues that it has paid the FET through the contract payment rates that include all FET. Respondent's Reply Record Submission at 5. Even if appellant under-estimated the amount of tax it would have to factor into its offer, so that its regular contract invoices did not fully capture the amount of the FET, appellant paid the taxes as required by 26 U.S.C. § 4263(c), and is simply seeking additional contract payments through the additional invoices at issue here. There is no violation of statute, since the taxes have been fully reimbursed by either respondent, through its payment of appellant's regular contract invoices, or by appellant.

Appellant argues that the after-imposed tax provision of the Standard Tax clause should be read into the Commercial Item tax clause under the *Christian* doctrine. That doctrine, enunciated in *G.L. Christian & Associates v. United States*, 312 F.2d 418, *rehearing denied*, 320 F.2d 345 (Ct. Cl. 1963), requires missing mandatory clauses, which express a significant or deeply ingrained strand of public procurement policy, to be read into contracts. *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993). The Standard Tax clause, however, is not a mandatory clause for commercial item contracts. Rather, the mandatory clause is the Commercial Item Tax clause incorporated into the appealed contract. 48 CFR 12.301(b)(3).

#### Decision

The appeal is **DENIED**.

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ANTHONY S. BORWICK  
Board Judge

We concur:

  
  

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ALLAN H. GOODMAN  
Board Judge

JEROME M. DRUMMOND  
Board Judge